APPENDIX A

Decision of the Federal Railroad Administration dated December 24, 1996

US Department
Of Transportation

400 Seventh St. S.W.
Washington, D.C. 20590

Federal Railroad
Administration

Dec. 24, 1996

Hugh H. Welsh, Esq.
Deputy General Counsel
The Port Authority of NY & NJ
One World Trade Center
New York, N.Y. 10048

Dear Mr. Welsh:

I write in response to your letters dated August 9 and October 24, requesting that the Federal Railroad Administration (FRA) release the Port Authority Trans-Hudson Corporation (PATH) from FRA jurisdiction, and referencing previous correspondence and meetings with members of my staff. Specifically, you state that since PATH's operations are more like those of a rapid transit system than a conventional railroad, FRA should no longer assert jurisdiction over PATH. You then indicate that PATH should instead be subject to regulation by the Federal Transit Administration.

In response to your jurisdictional concerns, we carefully analyzed all of the factual and legal arguments presented in your submissions to FRA (including correspondence

regarding Waiver Petition Docket Nos. LI-94-1 and PB-94-2), and asked FRA's Regional Office in Cambridge, Massachusetts to inventory PATH's physical and operating characteristics. We were especially interested in determining whether there has been any factually significant change in circumstances on the PATH system since 1985. As you will recall, in the preamble to the final rule in FRA Docket No. RSOR-6, Notice No. 7, Control of Alcohol and Drug Use in Railroad Operations (50 FR 31508, August 2, 1985), FRA noted that PATH was "a somewhat unique case" and had asked for comments in the Notice of Proposed Rulemaking. However, PATH made no filing in that proceeding, and FRA noted that despite "characteristics that might warrant its exclusion from other Federal requirements, with respect to the control of alcohol and drug abuse it faces the same issues and accident potential that affect other short-haul passenger operators, [and] the rule has been crafted specifically to include PATH." Moreover, on page 4 of your "Petition for Partial Waiver from the Requirements of 49 CFR §232.13(c)(1). Relating to Intermediate Terminal Train Air Brake Tests," dated April 1, 1994, you concede that "PATH serves primarily short-haul commuters."

FRA accepts that PATH has some physical and operating characteristics similar to rail rapid transit systems that are not connected to the general railroad system of transportation, and acknowledges that PATH recently removed two switches from its line which formerly connected PATH's westbound mainline track G to track owned by the National Railroad Passenger Corporation (Amtrak). However, in light of the nature of PATH's operations, your letters and supporting materials provide no persuasive rationale for rescinding FRA's determination that PATH is a railroad carrier within the meaning of 49 U.S.C. §20102 generally. As you are aware, that provision applies to, among others, "commuter or other short-haul railroad passenger service in a metropolitan or

suburban area and commuter railroad service that was operated by the Consolidated Rail Corporation on January 1, 1979." See 49 U.S.C. §20102(1)(A)(i). We believe that PATH is among the types of railroads Congress intended to be subject to Federal railroad safety jurisdiction. We have given your request every consideration, but conclude that we cannot grant the relief requested. Accordingly, we must deny that request.

Sincerely,

S. Mark Lindsey
Chief Counsel

cc: Lawrence M. Mann, Esq.

APPENDIX B

Judgment and Memorandum Opinion of the United States Court of Appeals for the District of Columbia Circuit Filed December 15, 1997

Bills of cost must be filed within 14 days after entry of judgment. The Court looks with disfavor upon motions to file bills of costs out of time.

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 97-1103

Port Authority Trans-Hudson Corporation,

Petitioner

v.

Federal Railroad Administration,
United States Department of Transportation, and
United States of America,

Respondents

United Transportation Union
Brotherhood of Signalmen and
Brotherhood of Locomotive Engineers,

Intervenors

On Petition for Review of A Determination of the Federal Railroad Administration

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Before: GINSBURG, HENDERSON, AND TATEL, Circuit Judges.

JUDGMENT

This appeal was considered on the record from the Federal Railroad Administration and on the briefs filed by the parties. The court is satisfied that the appropriate disposition of this case does not call for a published opinion. *See*, D.C. Cir. Rules 34(j),36(b). For the reasons given in the attached memorandum, it is

ORDERED and ADJUDGED that the petition for review be denied.

Port Auth. Trans-Hudson Corp. V. Federal Railroad Admin., 97-1103

MEMORANDUM

Port Authority Trans-Hudson Corp. (PATH) operates a 13.8-mile-long nonhighway ground transportation system connecting New York and New Jersey. Although it has been regulated as a railroad for decades, PATH recently sought a declaration from the Federal Railroad Administration (FRA) that it does not fall within the FRA's jurisdiction because it is not a "railroad" as defined in 49 U.S.C. §20102.

The statute draws a distinction between "commuter or other short-haul railroad passenger service in a metropolitan or suburban area," over which the FRA has jurisdiction under subsection (1)(A)(I), and "rapid transit operations that are not connected to the general railroad system of transportation," over which it lacks jurisdiction under subsection (1)(B). PATH argues that because it no longer has any connections "to the general railroad system of transportation" it now comes

under the exception for rapid transit operations in subsection (1)(B). Although the "FRA accepts that PATH has some physical and operating characteristics similar to rail rapid transit systems that are not connected to the general railroad system of transportation," the FRA determined that PATH is a commuter service and therefore is "among the types of railroads Congress intended to be subject to Federal railroad safety jurisdiction." Letter from S. Mark Lindsey, Chief Counsel, FRA, to Hugh H. Welsh, Deputy General Counsel, PATH, December 24, 1996.

Because the PATH shares characteristics of both "rapid transit operations" and "commuter or other short-haul railroad passenger service," the proper classification of PATH is ambiguous, and the FRA did not abuse its discretion in determining that PATH remained a railroad carrier within the meaning of 49 U.S.C. §20102. Accordingly, we deny the petition for review.

The Clerk is directed to withhold the issuance of the mandate herein until seven days after disposition of any timely petition for rehearing, *See,* D.C. Cir. Rule 41.

FOR THE COURT:
Mark J. Langer, Clerk

BY:

Deputy Clerk

APPENDIX C

Order of the United States Court of Appeals for the District of Columbia Circuit Denying Rehearing Filed February 27, 1998

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 97-1103 September Term, 1997

Port Authority Trans-Hudson Corporation,

Petitioner

v.

Federal Railroad Administration,
United States Department of Transportation, and
United States of America,

Respondents

United Transportation Union
Brotherhood of Signalmen and
Brotherhood of Locomotive Engineers,

Intervenors

Before: Ginsburg, Henderson and Tatel, Circuit Judges.

ORDER

Upon consideration of petitioner's petition for rehearing filed January 29, 1998, it is

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY:

Robert A. Bonner
Deputy Clerk